

\*\*E-Filed 1/23/2009\*\*

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION**

JAMES ALAN BUSH,

Plaintiff,

v.

JAMES ANTON, et al.,

Defendants.

Case Number C 08-3459 JF (RS)

ORDER<sup>1</sup> GRANTING MOTION TO  
DISMISS WITHOUT LEAVE TO  
AMEND

[re: doc. no. 22]

Defendants James Anton, Benjamin Holt, and Sunnyvale Department of Public Safety (collectively, "Defendants") move to dismiss Plaintiff's complaint for failure to prosecute. On October 26, 2008, the Court granted Defendants' motion to dismiss for failure to state a claim, with leave to amend. The Court instructed Plaintiff that any amended complaint must be filed within thirty days of the order. Plaintiff did not file an amended pleading. Plaintiff also did not file opposition to the instant motion or appear at the hearing for oral argument on January 23, 2009.

A defendant may move for dismissal of an action for failure to prosecute or failure to comply with court orders. Fed. R. Civ. P. 41(b). In determining whether to dismiss a case under

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<sup>1</sup> This disposition is not designated for publication in the official reports.

Rule 41(b), a district court should consider five factors: (1) the public's interest in expeditious resolution of litigation; (2) the court's need to manage its docket; (3) the risk of prejudice to the defendants; (4) the public policy favoring the disposition of cases on their merits; and (5) the availability of less drastic sanctions. *In re Eisen*, 31 F.3d 1447, 1451 (9th Cir. 1994) (failure to prosecute); *Ferdik v. Bonzelet*, 963 F.2d 1258, 1260-61 (9th Cir. 1992) (failure to comply with court orders).

In the instant case, the first two factors—the public's interest in expeditious resolution of litigation and the court's need to manage its docket—weigh in favor of dismissal. Plaintiff has failed to respond to the Court's instructions as set forth in its prior order of dismissal. This inaction hinders the Court's ability to manage its docket and indicates that Plaintiff does not intend to litigate this case with reasonable diligence.

The third factor—prejudice to defendants—also weighs in favor of dismissal. Although no showing of actual prejudice was made, prejudice is presumed from unreasonable delay. *Moore v. Telfon Commc'ns Corp.*, 589 F.2d 959, 967 (9th Cir. 1978); *Cristanelli v. U.S. Lines*, 74 F.R.D. 590, 593 (C.D. Cal. 1977). Nothing suggests that such a presumption is unwarranted in this case. Moreover, requiring Defendants to continue to litigate this action will result in the wasteful expenditure of both Defendants' and this Court's time and resources.

The fourth factor reflects the public policy that cases should be decided on their merits. Despite this policy, however, it is a plaintiff's responsibility "to move towards that disposition at a reasonable pace, and to refrain from dilatory and evasive tactics." *Morris v. Morgan Stanley*, 942 F.2d 648, 652 (9th Cir. 1991). Plaintiff has not discharged these responsibilities. In the circumstances here, the public policy favoring resolution of disputes on their merits does not outweigh Plaintiff's failure to prosecute this case. Finally, the fifth and final factor—availability of less drastic sanctions—also supports dismissal. It does not appear that Plaintiff intends to prosecute this case.<sup>2</sup> Plaintiff has filed multiple actions in this Court and has contacted the Court

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<sup>2</sup> This Court has dismissed several other cases filed by Plaintiff due to failure to prosecute, including case numbers 07-CV-00831-JF (*Bush v. Sunnyvale Police Dep't*), 5:07-CV-03641-JF (*Bush v. Bichel*), 5:07-CV-03942-JF (*Bush v. Santa Clara Valley Med. Ctr.*),

1 on numerous prior occasions, and his silence with respect to the instant case indicates that he has  
2 no intent of pursuing the matter further. Accordingly, dismissal is appropriate.

3 Good cause therefor appearing, IT IS HEREBY ORDERED that Defendants' motion to  
4 dismiss is GRANTED, without leave to amend.

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7 DATED: January 23, 2009

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11 JEREMY FOGEL  
12 United States District Judge  
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5:07-CV-04241-JF (*Bush v. Pinto*), 5:07-CV-04261-JF (*Bush v. Bickel*), 5:07-CV-04460-JF  
(*Bush v. Cao*), and 5:08-CV-00539-JF (*Bush v. U.S. Attorney General*).

1 This Order has been served upon the following persons:

2 Rebecca L. Moon rmoon@ci.sunnyvale.ca.us

3 James Alan Bush  
4 701 South Abel Street, M-4  
5 Milpitas, CA 95035